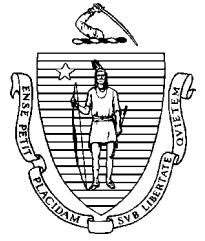




# Commonwealth of Massachusetts

## State Ethics Commission

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### CONFLICT OF INTEREST OPINION EC-COI-94-2

#### FACTS:

A state agency proposes to make certain passes available to certain state officials, specifically members of the General Court, constitutional officers and cabinet secretaries. The agency has not yet determined what amount, if any, to charge for these passes. When a charge is established, in all likelihood, the value of the pass will exceed \$50 when the price of the pass is compared to the fees which otherwise would be incurred.

The proposed granting of passes is a goodwill gesture in recognition of the status and position of these officials, and their need to engage in frequent scheduled and unscheduled travel. The Agency has always provided free passes to the Governor and Lieutenant Governor. The Governor's office is currently assigned four such passes; the Lieutenant Governor's office one.

#### QUESTIONS:

1. Does G.L. c. 268A, §3 prohibit the Agency from providing, and the state officials from receiving, passes for free or at a reduced fee?
2. Does G.L. c. 268A otherwise permit receipt of free or reduced fee passes?

#### ANSWERS:

1. No.
2. Yes, provided that the passes are used only in connection with official state business.

#### DISCUSSION:

##### Section 3

This opinion presents an opportunity for the Commission to re-evaluate a question raised in a prior opinion, *EC-COI-92-37*, within the context of a factual record that more squarely presents the issue. In 92-37, the Commission considered, among other things, whether a legislator may accept free or discounted office space for a district office from a donor who may be a political subdivision of the Commonwealth. That decision, which held that G.L. c. 268A, §3 was applicable, focused primarily on the gift from a private donor, such as a business associate or constituent, with little or no discussion of the distinction between such a donor and a *public entity* donor. We now conclude that where an item of substantial value is given to a public employee as the result of an official act of the Commonwealth or a political subdivision thereof, no issue is raised under §3.

General Laws c. 268A, §3(a) provides: "Whoever otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of substantial value<sup>1/</sup> to any present or former state, county or municipal employee or to any member of the judiciary, or to any person selected to be such an employee or member of the judiciary, for or because of any official act performed or to be performed by such an employee or member of the judiciary or person selected to be such an employee or member of the judiciary" violates that section of the conflict law. A corresponding

provision under §3(b) prohibits receipt of items of substantial value for or because of a state employee's official duties. Read literally, the word "whoever" in §3(a) would appear to prohibit the Agency's furnishing of these passes. Thus, we must first consider whether §3(a) is intended to apply where the Commonwealth, a state agency, or a political subdivision of the Commonwealth is the giver.

Under G.L. c. 4, §7(23), the word "whoever" has the same statutory definition as "person" and includes "corporations, societies, associations, and partnerships". "[I]t is a widely accepted rule of statutory construction that general words in a statute such as §persons' will not ordinarily be construed to include the State or political subdivisions thereof." *Hansen v. Commonwealth*, 344 Mass. 214, 219 (1962); *Howard v. Chicopee*, 299 Mass. 115, 121 (1937); *New Bedford v. New Bedford, Woods Hole, Martha's Vineyard Nantucket S.S. Authy.*, 329 Mass. 243, 250 (1952). While some jurisdictions have adopted an exception to this general rule of statutory construction where the statute at issue is "intended to prevent injury and wrong", *Nardone v. United States*, 302 U.S. 379, 383-384 (1937), this exception has not been adopted in Massachusetts. See *Kilbane v. Secretary of Human Services*, 14 Mass. App. Ct. 286 (1982) (holding that the Commonwealth is not a "person" within the meaning of G.L. c. 266, §91 concerning false advertising); see also *Commonwealth v. Elm Medical Laboratories, Inc.*, 33 Mass. App. Ct. 71, 76-77 (1992) (Commonwealth not a "person" for purposes of the State Civil Rights Act). Applying this general rule of statutory construction, we conclude that the state agency's official proposal to furnish free or reduced fee passes to certain state officials does not raise issues under §3(a), because, by its terms, §3 does not contemplate the situation where the Commonwealth is the giver.

This conclusion is supported by our observation that §3 is not designed to prevent lawful acts of the Commonwealth or its political subdivisions. Compare *Attorney General v. Woburn*, 322 Mass. 634, 637 (1948) (where "whoever" construed to include municipalities because the legislative objective — preventing discharge of sewage into rivers — would not be possible if cities and towns were exempted). Rather, we have previously recognized that "[t]he preventative purpose of §3 is to preclude public employees from §temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do — a good job.'" *EC-COI-89-25* (quoting *In re Michael*, 1981 SEC 59, 68). Such potential for preferential treatment of the donor is clearly present when the donor is a private person or entity with business before the Commonwealth, and our decisions recognize as much. See, e.g., *EC-COI-84-14*, (car purchase discount); 85-42 (state employee prohibited by §3 from accepting offer of discount mortgage from individual). Here, however, it is the Government who gives the pass, not for the purpose of securing favorable treatment for itself, but in recognition of Government employees' work for and travel on behalf of the Government. In such a case, we believe that the financial temptation or pressure to influence public officials that §3 is designed to prevent is not present. *Accord Muschany v. United States*, 324 U.S. 49, 64-68 (1944) (challenged contract was not against public policy as articulated in conflict of interest laws, because there is a lack of financial temptation or political pressure to influence public officials where payments under the contract come from the government and not a third party).<sup>2/</sup>

With regard to the state official's receipt of the pass, we note that the conflict of interest law must be given a workable meaning. *Graham v. McGrail*, 370 Mass. 133, 140 (1976). In light of the fact that we have concluded that §3(a) should not apply to free or reduced fee passes given officially by a state agency, we must also conclude that the state officials in question do not violate §3(b) by receiving these passes.

## Section 23

The state officials are nonetheless subject to G.L. c. 268A, §23(b)(2), which prohibits the knowing use or attempted use of their official positions to secure for themselves or others unwarranted privileges or exemptions of substantial value, which are not properly available to similarly situated individuals. The Commission concludes that the officials would violate §23(b)(2) by receiving free or reduced fee passes, unless the passes were restricted to use for government purposes.

Our decision is guided by the principles expressed in *EC-COI-86-17*, where we reviewed an automobile discount policy offered to selected law enforcement officers. We concluded that acceptance of the discount violated §23(b)(2). We said:

In the case of a selective discount to a public employee, the employee is able to realize a benefit

from which the public is excluded. Receipt of such a benefit negates the trust that the public is entitled to place in public employees: that public, not private, interests are furthered when the public employee performs his duties. In such a case the private citizen may reasonably ask why a public official is entitled to compensation or benefits over and above what the taxpayer has authorized and from which he has been excluded. As the Commission stated in *EC-COI-83-4*, §23 prohibits as an unwarranted privilege a favoritism policy under which “those who serve the people are treated better than the people themselves.”

*EC-COI-86-17*.

Therefore, the proposed free or reduced fee annual pass policy violates §23 if the pass can be used for personal, non-government purposes. On the other hand, as we pointed out in *EC-COI-86-17*, §23 does not preclude the use of such passes in connection with the performance of official duties. This is because the state officials “are entitled to reimbursement from the commonwealth for any travel expenses incurred in the performance of their official duties. Inasmuch as they would be entitled to free passage from the commonwealth in any event, the fact that the state agency, rather than [their respective state agencies or] the General Court, bears the burden of the expense does not grant an unwarranted privilege to them, within the meaning of §23(b)(2).” *Id.* Thus, we conclude that no issue is raised under §23(b)(2), where the state official is otherwise entitled to reimbursement of business related travel, and uses the pass in lieu thereof.

In summary, we conclude that the giving or receipt of these passes does not violate G.L. c. 268A, §3. In order to comply with §23(b)(2), however, free or reduced fee passes may only be distributed to state officials for use in connection with the exercise of their official duties. Passes which are used for other purposes will violate §23 if the value of that usage exceeds \$50 in any calendar year.

**DATE AUTHORIZED:** February 25, 1994

<sup>1/</sup> Anything valued at \$50 or more is “of substantial value”. *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8*.

<sup>2/</sup> We caution, however, that this opinion is limited to situations where the state agency acts as such officially to supply the public employee with an item of substantial value. Therefore, nothing in this opinion should be construed as holding that §§3(a) and 3(b) are inapplicable to gifts made by one or more state employees to another state employee. Where the appropriate nexus is established, i.e., where the item of substantial value is given for any “official act performed or to be performed”, the donor in such a case violates §3(a), and the recipient violates §3(b). This is because the gift comes not from the Commonwealth through its official action, but from the state employee, who is clearly subject to §3(a). The potential for preferential treatment or improper pressure on official acts addressed by §3 is present in such a case, where, in this case, it is not present.